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Nos. 95-124 and 95-227

IN THE
Supreme Court of the United States
October Term, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents,

ALLIANCE FOR COMMUNITY MEDIA, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

MOTION OF THE FAMILY LIFE PROJECT OF THE AMERICAN CENTER FOR LAW AND JUSTICE FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to the Rules of this Court, the Family Life Project of the American Center for Law and Justice respectfully moves for leave to file the attached brief *amicus*

curiae in support of the Respondents in the above-captioned cases.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties. No party has yet denied consent to our filing of a brief *amicus curiae*; however, we have not yet received responses from all of our requests.

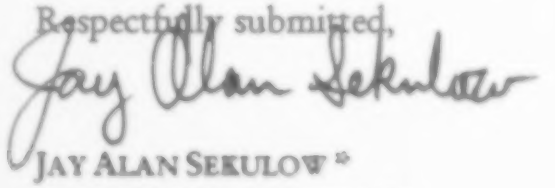
The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal and education organization. Its purpose is to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related activities.

The Family Life Project of the American Center for Law and Justice ("Family Life Project") has been organized within the ACLJ to focus attention on the role of the family as the primary social and religious institution of a just society. The Project is dedicated to defending families against all efforts to undermine their sovereignty, nature and importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the important work of families: rearing children.

The present case involves the serious problem of pornography on cable television systems. The statute and regulations at issue here help to segregate indecent programming on cable television systems and, consequently, are valuable to families as a means of protecting children.

The proper resolution of this case is a matter of substantial organizational concern to the Family Rights Project of the American Center for Law and Justice because of its commitment to American families.

Respectfully submitted,



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INTEREST OF THE AMICUS CURIAE

The interest of the Family Life Project of the American Center for Law and Justice is set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

Having been confronted by the indecency being purveyed as programming on certain leased access and public, educational and government access channels of cable systems, and recognizing its own significant role in making indecent programming available and unavoidable on cable television systems, Congress acted in 1992 to bring to an end its unfortunate experiment in hamstringing cable system operators who formerly enjoyed the right to prevent broadcasts of indecent programming on their systems. That Congress and the Federal Communications Commission were confronted with a real problem of profligate indecency, if not obscenity, is undeniable. That Congress acted to restore editorial control over the programming shown on leased access and public, educational and government access channels to cable system operators, as a means of curbing the flood of graphic depictions of sexual and excretory functions that resulted from the Cable Communications Policy Act of 1984, is also certain. *See* Argument I, *infra*.

The means chosen by Congress to remedy the problem were not excessive: there has been no ban imposed on indecent programming on leased access and public, educational and government access channels. Rather,

Congress and the Federal Communications Commission took stock of the important, compelling government interest at stake here: the protection of children from exposure to damaging materials. And, Congress and the Commission employed the least restrictive means to limit the accessibility of such materials to children, while leaving in place the opportunity to view indecent programming for those who wished to expose themselves to such materials. The actions complained of by the Petitioners were modest, perhaps too modest. The regulations of indecent programming on leased access channels certainly survive scrutiny of the sort employed by this Court in both *Sable Communications v. FCC*, 492 U.S. 115 (1989) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See* Argument II, *infra*.

ARGUMENT

I. INDECENT PROGRAMMING ON CABLE TELEVISION IS A SERIOUS PROBLEM THAT WARRANTED CONGRESSIONAL AND ADMINISTRATIVE ACTION.

Petitioners allege that their First Amendment right to freedom of speech is violated by the 1992 Cable Television Consumer Protection and Competition Act, Pub.L.No. 102-385, § 10, and by regulations promulgated thereunder by the Federal Communications Commission. *See* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 7990 *et seq.* (1993); Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 19,623.

In cases involving alleged infringements on expressive rights protected by the First Amendment Freedom of Speech Clause, U.S. CONST. amend. I, cl. 3, this Court has always begun its analysis by examining the conduct that is alleged to be communicative, in order to determine whether or not First Amendment protections are even at issue. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985) (setting out three-step analysis for claimed violations of freedom of speech). That step reflects this Court's concern for judicial economy and avoidance of unnecessary constitutional analysis. *Id.* When that initial step is taken here, the clear conclusion is that the programming affected by the indecency restrictions are, *at best*, indecent, and, in many cases, certainly pornographic.

There is no question that Congress was aware of the problem of pornographic programming on cable systems. For example, on certain "leased access" channels,[1]

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1. The Cable Communications Policy Act of 1984 obliged certain cable system operators (those with more than thirty-six channels) to set aside as much as fifteen percent of their channel capacity for commercial use by unaffiliated persons. *See* Title 47 U.S.C. § 532(b). Further, the 1984 Act prohibited system operators from editing the content of such commercially leased channels. *See* Title 47 § 532(c)(2). While stripping system operators of editorial control over these "leased access" channels, the 1984 Act gave local franchising bodies power to regulate -- and, indeed, to bar -- programming if it was "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is

programming included depictions of "'men and women stripping completely nude' . . . performing oral sex . . . promoting 'incest, bestiality, [and] even rape . . . .'" *See Alliance for Community Media v. FCC*, 56 F.3d 105, 117 (D.C. Cir. 1995) (remarks of Senator Jesse Helms during Senate debate on Cable Television Consumer Protection and Competition Act's provisions regarding indecent programming). Further, Congress was aware that many of the leased access channels that cable system operators were compelled to set aside were, in fact, being used to display "'sex shows and X-rated previews of hard-core homosexual films,'" and "ads for phone lines letting listeners eavesdrop on acts of incest." *See Alliance for Community Media*, 56 F.3d at 117 (remarks of Senator Strom Thurmond during Senate debate on Cable Television Consumer Protection and Competition Act's provisions regarding indecent programming).

And Congress knew that the problem of pornographic programming was not limited to the "leased access" channels. Certain public, educational and governmental channels,[2]

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otherwise unprotected by the Constitution of the United States." *See* Title 47 U.S.C. § 532(h).

2. The 1984 Act also empowered franchising bodies to condition the grant or the renewal of a cable system franchise on the willingness of the operator to reserve "channel capacity" for "public, educational, or governmental use." *See* Title 47 U.S.C. § 531. Hereinafter, "public, educational, or governmental use" channels are referred to as PEG channels. The 1984 Act allowed cable system operators, together with franchising authorities, to specify that they

> were also being used, for example, 'to basically solicit prostitution through easily discernible shams such as escort services, [and] fantasy parties, where live participants, through two-way conversation through the telephone . . . [solicit] illegal activities.'

Alliance for Community Media, 56 F.3d at 117 (remarks of Senator Wyche Fowler during Senate debate on 1992 Act). Given its awareness of the content shown on many leased access and PEG channels, Congress quite properly concluded that public access "clearly . . . has . . . been abused . . . ." *Cf. Alliance for Community Media*, 56 F.3d at 117 (remarks of Senator Tim Wirth during Senate debate).

Lest Petitioners charge that such descriptions constitute legislative histrionics or overblown rhetorical flourish, the Federal Communications Commission was also presented with ample evidence of the pornographic abuses of both leased access channels and PEG channels. The Commission received evidence of leased access channels portraying "'in graphic detail intercourse, masturbation and other sex acts,'" and advertising "'sex-oriented products and services, such as 'escort services,' 'dial-a-porn' telephone lines and Screw Magazine . . . .'" *See Alliance for Community Media*, 56 F.3d at 117 (quoting public comments to the FCC on proposed regulations implementing 1992 Act).

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could refuse to provide cable services if they are "obscene or are otherwise unprotected by the Constitution." *See* Title 47 U.S.C. § 544(d)(1).

Further, as the Commission learned, local public access channels had been used to transmit, during the so-called "prime time" programming period, depictions of "'nude women . . . squatting and gyrating so their genitals were in full view,' and 'a tape of a totally naked man dancing and screaming obscenities.'" *Id.* And, although it was Congress, not the federal Executive, that probably bore responsibility for the dilemma that confronted cable system operators who found themselves powerless to edit out such smut, it was a photograph of the President of the United States on which a public access channel user urinated during a frontally nude depiction of that act. *Id.* at 118.

Given the information available to Congress and the Federal Communications Commission, it is plain that, at the heart of this dispute are communications that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Nothing in the First Amendment requires that Congress or the FCC stand by silently while our Nation's children are given ready access — as a direct consequence of a flawed federal experiment — to smutty and salacious depictions of human sexual and excretory functions.

II. THE 1992 ACT IS THE LEAST RESTRICTIVE MEANS OF SECURING THE COMPELLING GOVERNMENT INTEREST IN LIMITING CHILDREN'S ACCESS TO INDECENT PROGRAMMING.

One consequence of the Cable Communications Policy Act of 1984 was that cable systems were made to carry programming *and* barred from exercising editorial control over such programming, even though it might have been obscene, lewd, lascivious, filthy, or indecent. *See* Argument I, *supra*. Indecent programming and indecent programmers, as a consequence of legislative policy-making in the 1984 Act, had found quite a haven on cable systems around the Nation. Congress' decision to interfere with the editorial judgment of cable system operators represented a watershed, as the seedy and the unseemly became the available and unavoidable.

With the benefit of hindsight, the 1984 Act played a clear and unfortunate role in the propagation of indecent broadcasting on cable systems. That unfortunate consequence was brought to the attention of the Congress. *See Alliance for Community Media*, 56 F.3d at 117-18 (summarizing remarks of Senators Helms, Thurmond, and Fowler). Thus, as Congress is free to do under the Constitution, it made a decision to change the policies embodied in the 1984 Act as part of the overhaul of cable regulation embodied in the Cable Consumer Protection and Competition Act of 1992.

The title of Section 10 of the 1992 Act betokens its purpose: "Children's Protection from Indecent Programming on Leased Access Channels." *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10. This Court has said that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[,]" *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). This Court has never held, however, that indecent communications enjoy an absolute First Amendment privilege, or that governments are utterly powerless to respond to the problems associated with indecent programming. Rather, this Court has held

> [t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Sable, 492 U.S. at 126.

Further, the interest that prompted Congress to act, the protection of children, has been recognized by this Court as one which is compelling:

> [w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

Sable, 492 U.S. at 126.

Our Nation's duty to its children, to protect them from harm and to equip them for the future, has been recognized as a paramount obligation. With respect to the "dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene . . . ," this Court has stated, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 753, 758 (1982). Of course, here the indecent programming has not *necessarily* been produced with the involvement of children. The threat to children from such programming lies, not in its making, but in the immediacy of access.

Technological advances in communications — cable television, direct satellite delivery of programming, telephone services, computer bulletin boards, and the Internet — have galloped ahead of governmental regulation. Unsurprisingly, all of these fast-paced and evolving technologies have been used by indecent programmers, and have made sexually explicit, *indecent* materials, readily available to children. Children who are not even looking for salacious portrayals of the bizarre and the crude were, nonetheless, able to gain instant access to indecent programming on leased access and PEG channels.

In response to this growing and serious problem, Congress might have considered enacting a complete prohibition on indecent programming on cable systems. Congress did not engage in the sort of sweeping prohibition of indecency that prompted this Court to strike the ban on

indecent telecommunications in *Sable*. Rather, Congress took two steps that, together, neither completely prohibited indecent programming on leased access and PEG channels nor made access to such programming too burdensome to withstand scrutiny here. First, Congress *untied* the hands of cable system operators (whose editorial control over leased access and PEG channels was eliminated in the 1984 Act). Second, Congress directed the FCC to oversee the implementation of steps to segregate indecent programming to channels that would remain available on request.

In *Sable*, of course, this Court struck down a total ban on indecent interstate commercial telephone communications, 492 U.S. at 126-31, while affirming a ban on obscene interstate commercial telephone communications, 492 U.S. at 124-26. The 1992 Act and the FCC's rulemaking here, although targeted at indecent communications, are quite different in character from the total ban on indecent telephone communications struck in *Sable*.

The indecent programming on leased access and PEG channels — identified by Congress, reported to the FCC, and summarized in the opinion of the court of appeals below — is a creature of Congress' making. It was Congress, in 1984, which forced cable system operators to set aside channels for leased access and simultaneously stripped those cable systems of the power to edit content, even though the content was indecent or pornographic. *See* Title 47 U.S.C. §§ 531, 532(b), 532(c)(2), 544(d)(1); *cf. Alliance for Community Media*, 56 F.3d at 110-11 (tracing the rise of leased access and PEG channels within cable systems). And, it was Congress that gave local

franchising authorities the power to compel cable system operators to make channels available for PEG use, as a condition for receiving or renewing a system franchise. *Id.*

Congress has only modestly approached the problems wreaked on the public by its 1984 experimentation. In essence, the 1992 Act restored to cable system operators editorial control over leased access channels. An examination of the pertinent sections of the 1992 Act shows that the Act is neither a sweeping ban nor more restrictive of indecent programming than necessary to serve the compelling government interest at stake.

Section 10(a) of the Act allows a cable operator to reject leased access programming if the cable system operator "believes [it] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Section 10(b) requires the FCC to make rules that would compel cable system operators who choose to continue carrying indecent programming on leased access channels to move all such programming to a separate channel, which could be blocked until the individual subscriber makes a written request for access. Section 10(c) empowers cable system operators to prohibit the use of PEG channels for the depiction of "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, in section 10(d), Congress eliminated the statutory immunity from criminal and civil liability for obscene programming shown on access channels that cable system operators had previously enjoyed.

Congress did not ban all indecent programming on cable systems. Thus, appeals to the holding in *Sable* are unavailing. Rather than legislatively proscribing an entire class of protected *but regulable* speech, Congress simply discontinued an experiment that has been shown fraught with unintended and disastrous consequences. The direct consequence of Congress' action was the restoration to cable system operators of the power to prevent indecent broadcasting and the obligation to respect the compelling governmental interest in limiting access to such programming by children. This Court in *Sable* found the flat ban on indecent interstate telecommunications to be the constitutional equivalent of "burn[ing] the house to roast the pig," *Sable*, 492 U.S. at 127 (citation omitted). Congress considered the indecent programming forcibly promulgated through cable systems as a consequence of the 1984 Act to be the equivalent of giving the pig the house and moving the family into the pig's pen.

Congress did not violate Petitioners' rights by its enactment of the 1992 Act. The Federal Communications Commission did not violate the Petitioners' rights by its subsequent rule-making. This Court has upheld against constitutional challenge systems of regulation which do not ban indecent communications but restrict the time, place and manner of their communication so as to protect minors from exposure to them.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld a declaratory judgment order of the Federal Communications Commission that the radio broadcast of a George Carlin monologue entitled, "Filthy Words," "'was

indecent and prohibited by 18 USC [§] 1464.'" 438 U.S. at 732 (citation omitted). What this Court had to say about "indecent" radio broadcasting, and regulatory restrictions thereof, could provide valuable guidance in the present case. Unlike *Sable*, *Pacifica Foundation* addresses the regulation of indecency, rather than its complete prohibition. In that respect, the reasoning in *Pacifica Foundation* is directed to analogous, if not identical, concerns.

Title 18 U.S.C. § 1464 prohibits the use of "any obscene, indecent, or profane language by means of radio communication." The Commission concluded that "the language used in the Carlin monologue [w]as 'patently offensive,' though not necessarily obscene . . . ." 438 U.S. at 731 (citation omitted). For the Commission, which was admittedly seeking to restrict the availability of such materials to children, the context of the broadcast of the monologue was key: it was "'broadcast at a time when children were undoubtedly in the audience . . . .'" 438 U.S. at 732 (citations omitted). After its order issued, the Commission clarified its order, stating it "'never intended to place an *absolute prohibition* on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" 438 U.S. at 733 (citations omitted, emphasis added).

In *Pacifica*, this Court undertook the tasks of defining "indecent," 438 U.S. at 739-41, and weighing the constitutionality of the Commission's declaratory judgment that "Filthy Words" constituted a prohibited broadcast of "indecent" language. Before this Court, Pacifica Foundation,

the Respondent-Broadcaster of the "Filthy Words," argued that the Commission had misunderstood and misinterpreted the statutory ban on radio broadcasting of "obscene, indecent, or profane" language. 438 U.S. at 739-40. Essentially, Pacifica argued that the statutory term "indecent" had the same meaning as the term "obscene." *Id.* Consequently, in Pacifica's view, the absence of any prurient appeal in "Filthy Words" and the Commission's hesitance to declare the monologue obscene should have placed the monologue outside of the scope of the statutory ban on radio broadcasts of "obscene, indecent, or profane" language. *Id.*

This Court was not persuaded by Pacifica's arguments; rather the Court relied on the commonly accepted meaning and dictionary definition of "indecent." "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." 438 U.S. at 740. To give content to "indecent," this Court looked to the dictionary:

> Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality; . . . .

438 U.S. 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

Having arrived at its workable definition for "indecent,"

and having concluded that "the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking[,]'" 438 U.S. at 747, this Court proceeded to examine the context of the broadcast of "Filthy Words" "because content of that character is not entitled to absolute constitutional protection under all circumstances . . . ." *Id.*

This Court has "long recognized that each medium of expression presents special First Amendment problems[,]" 438 U.S. at 748 (citation omitted), and has noted that "it is broadcasting that has received the most limited First Amendment protection." *Id.* Two principal justifications were offered by this Court in *Pacifica Foundation* for the limitations on First Amendment protection afforded to the broadcast medium: its ubiquity, and its "unique[] accessib[ility] to children, even those to young to read." 438 U.S. 748-49. What this Court found to be true in *Pacifica Foundation* is no less true today.

With some irony, this Court noted that even though some quite offensive written message "might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749. Irony can be an effective tool in forensics, but what Congress confronted as a result of the 1984 Act was much more than a sort of graphic "It Pays To Enrich Your Word Power." If the decision below, the debate in Congress on the passage of Section 10 of the 1992 Act, and the comments to the FCC's rulemaking have done nothing more, they have unveiled a truly horrific and shameful source of pollution of our Nation's social environment. *See* Argument I, *supra*.

The words of the "Filthy Words" monologue were patently offensive and the context of the broadcast, this Court found in *Pacifica Foundation*, fully justified the Commission's conclusion that the afternoon radio broadcast of the monologue violated federal law. In a similar vein, the pornographic, indecent programming that has come to plague leased access and PEG channels on cable systems around the country, fully justify Congress' decision to restore the status quo ante the 1984 Act. The 1992 Act "does not by any means reduce adults to [viewing] only what is fit for children . . . ." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)). Instead, the availability of indecent programming on cable systems, which from 1984 until 1992 had been subject to the discretion of programmers on leased access and PEG channels, will become a discretionary decision for cable system operators. *See* Cable Television Consumer Protection and Competition Act of 1992, § 10(a). Indecency will, unfortunately, continue to be available. But now indecent programming on cable systems will be segregated to insure minimal access by children. *See* Cable Television Consumer Protection and Competition Act of 1992, § 10(b).

Under the 1992 Act and the implementing regulations, indecency has not been proscribed. It has been segregated. The manner of segregation is the least restrictive one available to accomplish the important government purpose of protected children from exposure to those smutty programs that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. This Court should not permit appeals to the First Amendment to shield the purveyors of indecent programming from the reasonable regulations at issue in this case.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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